

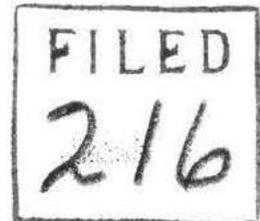
Governor:
Disapproval of Depositories
Auditor:
Disapproval of Depositories
Treasurer:
Selection of Depositories
Depositories, Demand:
Designation
Constitution:
Separation of Powers

- (1) Disapproval by Governor or Auditor of depository selection is a veto.
- (2) Treasurer cannot be compelled by judicial process to select depositories.
- (3) Existing depositories remain lawful pending further designations.

OPINION NO. 216

May 7, 1965

Honorable Warren E. Hearnes
Governor
Executive Office
Jefferson City, Missouri



Dear Governor Hearnes:

Reference is made to your letter wherein you requested the official opinion of this office as follows:

"I submit herewith for your opinion the following question: Does the Governor of Missouri have the power to veto the State Treasurer's selection or selections of banking institutions as state depositories under Article IV, Section 15 of the Constitution of Missouri, 1945 and the laws of Missouri?

"If the answer to the above question is in the affirmative, and assuming the selections made by the State Treasurer are disapproved or vetoed by the Governor, shall the State Treasurer then submit the names of different banking institutions as state depositories for the Governor's approval, not to include the names of those institutions previously disapproved, and if so, within what period after such disapproval."

The questions posed by you arise by reason of the submission to you of depository selections for demand deposits by the State Treasurer, your disapproval of said selections and subsequent request for the submission of further depository selections and the Treasurers refusal to submit further depository selections. Copies of the correspondence between your

office and the office of the State Treasurer in regard to this matter have been made available to us and are set out below.

"January 21, 1965

The Honorable Warren E. Hearnes, Governor
of the State of Missouri
The Honorable Haskell Holman, Auditor of
the State of Missouri
Jefferson City, Missouri

Gentlemen:

Please be advised that as State Treasurer of Missouri, I have selected as depositaries of State moneys on demand deposit, the following banking institutions (which are presently serving as such depositaries):

Mercantile Trust Company National
Association
Saint Louis, Missouri
Commerce Trust Company
Kansas City, Missouri
Central Missouri Trust Company
Jefferson City, Missouri

The foregoing selections of depositaries have been made by me, pursuant to the requirements and provisions of the Constitution and Statutes of Missouri, and are submitted for your approval.

Will each of you please note your approval by signing and returning to me the enclosed copy of this letter. When I have received your approvals, I shall proceed to enter into written contracts, in quintuplicate, with each named depositary as required by law. A specimen copy of such proposed contracts is enclosed.

When the contracts have been executed by me and the respective depositaries, I shall forward them for the notation thereon of your approval, and thereafter, I will distribute the copies of the contracts in the manner specified by law.

Very truly yours,

/s/ M. E. Morris
TREASURER OF THE STATE OF MISSOURI

APPROVED:

GOVERNOR OF THE STATE OF MISSOURI

/s/ Haskell Holman
AUDITOR OF THE STATE OF MISSOURI

"January 22, 1965

Sir:

Pursuant to authority vested in me by provisions of Article 4, Section 15 of the Constitution of Missouri, 1945, and statutes of Missouri, I do not approve the banking institutions selected by the Honorable M. E. Morris, Treasurer of the State of Missouri, as depositories of state money on demand deposit, in his letter of January 21, 1965, to wit:

Mercantile Trust Company National
Association
St. Louis, Missouri

Commerce Trust Company
Kansas City, Missouri

Central Missouri Trust Company
Jefferson City, Missouri

/s/ Warren E. Hearnes
GOVERNOR OF THE STATE
OF MISSOURI

"February 19, 1965

Honorable M. E. Morris
State Treasurer
Capitol Building
Jefferson City, Missouri

Dear M.E.:

I respectfully request that you submit to me for approval or disapproval the names of banking institutions as depositories of state money on demand deposit different from those submitted in your letter to me of January 21, 1965, and not approved by me as set forth in my letter to you of January 22, 1965.

Sincerely yours,

/s/ Warren E. Hearnes

Warren E. Hearnes"

"February 23, 1965

The Honorable Warren E. Hearnes
Governor of the State of Missouri
Jefferson City, Missouri

Dear Warren:

I acknowledge your letter of February 19, 1965, in which you request that I submit to you for approval or disapproval the names of banking institutions different from those submitted in my letter of January 21, 1965. Your letter was hand-delivered to me a few minutes before the press conference at which you released the letter and concerning which you commented at some length.

In my letter of January 21, 1965, I advised you of my selections, all of which were made pursuant to the requirements and provisions of the Constitution and Statutes of Missouri. I find no provisions in either the Constitution or the Statutes requiring that I make other selections, and I am cited to none by your letter of February 19, 1965.

It is my prerogative and responsibility under the law to make the selection of banking institutions in which shall be deposited all moneys in the State Treasury. The three institutions which I have so selected are qualified in every respect and by every test. These selections have been approved by the State Auditor.

Your letter of January 22, 1965, expressed no reason for your decision not to approve my selections and I am advised by counsel that I am under no duty to make other selections simply because you choose to withhold your approval arbitrarily.

As the State Treasurer and an elected official, I do not intend to abrogate the functions of my office. To comply with your request would constitute an abdication by me of my constitutional duty and power to select depositaries of state moneys, it would negate the State Auditor's approval of those depositaries, and, in effect, it would transfer to you my constitutional duty to select. Therefore, I respectfully decline to comply with the request in your letter of February 1, 1965.

Cordially,

State Treasurer"

The depositaries selected by the Treasurer for demand deposits in his letter of January 21, 1965, have been serving in this capacity pursuant to contracts entered into on the first day of February, 1963. Copies of these contracts have been made available to this office, but no useful purpose would be served by reciting the terms thereof in full. Each of the contracts, which are identical in form, contain the following provision:

"This contract shall continue until the first day of February, 1965, or until another depository is selected for the state funds governed by this instrument;
. . . ."

This office has been informed that the state funds remain on deposit at these three banking institutions and the current receipts of the state are being deposited in these banking institutions as soon as the revenue collected and moneys received come into the state treasury.

The custody, investment and deposit of state funds is provided for by Article IV, Section 15 of the Constitution of Missouri as follows:

"The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. The state treasurer shall determine by the exercise of his best judgment the amount of state moneys that are not needed for current operating expenses of the state government and shall place all such moneys not needed for payment of the current operating expenses of the state government on time deposit, bearing interest, in banking institutions in this state selected by the state treasurer and approved by the governor and state auditor or in short term United States government obligations maturing and becoming payable one year or less from the date of issue or in other United States obligations maturing and becoming payable not more than one year from the date of purchase. The investment and deposit of such funds shall be subject to such restrictions and requirements as may be prescribed by law. Banking institutions in which state funds are deposited shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping and payment of the deposits and interest thereon pursuant to deposit agreements made with the state treasurer pursuant to law. No duty

shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds." (Emphasis added.)

It is noted that the cited section of the constitution provides that the investment and deposit of state funds shall be subject to such restrictions and requirements as may be prescribed by law and that agreements shall be made by the state treasurer with depositaries pursuant to law. However, the power to designate depositaries granted to the treasurer, governor and auditor is a self-executing delegation of constitutional power. Therefore, the questions raised by your letter concerning the exercise of this power relate to a proper construction of the constitutional provision.

The constitutional provision delegating the power to the treasurer, governor and auditor to designate depositaries for state funds has never been construed by the courts. In expressing an opinion in regard to these powers, this office is guided by principles of constitutional construction approved by the Supreme Court of Missouri in *State ex rel. Moore v. Teberman*, 250 S.W. 2d 701, l.c. 705; *State ex rel. Randolph County v. Walden*, 206 S.W. 2d 979, l.c. 982, 983, 984; *State ex rel. Russell v. State Highway Commission*, 42 S.W. 2d 196, l.c. 202, 203; and *State ex rel. Heimberger v. Board of Curators of University of Missouri*, 188 S.W. 128, l.c. 130, 132. Thus it is presumed that words have been employed in their natural and ordinary meaning. No forced or unnatural construction is to be placed upon the language. Attempt is made to arrive at the true intent and purpose of those who drafted the instrument. Effect should be given to the spirit and intent of the instrument and the strict letter should not control if it leads to incongruous results clearly not intended. Extrinsic aids may be resorted to when the language used is ambiguous. The debates of the constitutional convention may be examined for aid and interpretation if the meaning remains in doubt.

The specific language of the constitutional provision applicable to the questions being considered in this opinion is as follows:

"The state treasurer shall be custodian of all state funds. All * * * moneys received by the state * * * shall go * * * into the state treasury, * * * the state treasurer shall deposit all moneys in the state treasury * * * in

banking institutions selected by him and approved by the governor and state auditor. * * *

Although not absolutely essential to the conclusions reached herein, the background and history of this constitutional provision does much to clarify and enlighten the understanding of the nature and extent of the powers and duties exercised by the three officers in designating state depositaries.

HISTORY OF OFFICE OF TREASURER

When Missouri became a state, the treasurer was not elected by the people. The Constitution of 1820, Article III, Section 31, provided for the appointment of the state treasurer by the general assembly, biennially, by joint vote of the two houses of the general assembly. Amendment Article VIII to the Constitution in 1850 - 51 provided for the election of the state treasurer to serve for a term of four years. The Constitution of 1865 and the Constitution of 1875 also provided for the election of the state treasurer. In the constitutional convention which submitted the Constitution of 1945, the original proposal for executive officers provided for the appointment of the state treasurer by the governor in a cabinet form of government. However, the cabinet form of government was rejected by the convention and the Constitution of 1945 continued the provision for the election of the state treasurer for the term of four years.

BACKGROUND OF CONSTITUTIONAL PROVISION

Prior to the adoption of the Constitution of 1875, the subject of depositaries for state funds was not provided for in the constitution and apparently there were no statutes in regard thereto. In theory, all moneys of the state were deposited in the vault of the Capitol Building in the care and custody of the state treasurer. The moneys were then disbursed directly from the vault by the treasurer upon the presentation of warrants. However, apparently it was the practice of the treasurer to deposit the state moneys with various banks and to draw upon such deposits when warrants were presented to him. Apparently bonuses were being paid directly to the treasurer by the various banks in which he had deposited state funds.

The constitution of 1875, Article X, Section 15, provided as follows:

"All moneys now, or at any time hereafter, in the State Treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney-General select, the said bank or banks giving security satisfactory to the Governor and Attorney-General, for the safe-keeping and payment of such deposit, when demanded by the State Treasurer on his checks--such bank to pay a bonus for the use of such deposits not less than the bonus paid by other banks for similar deposits; and the same, together with such interest and profits as may accrue thereon, shall be disbursed by said Treasurer for the purposes of the State, according to law, upon warrants drawn by the State Auditor, and not otherwise." (Emphasis added.)

The recommendation to the convention by the committee on revenue and taxation of a section providing for the deposit of state moneys in banks selected by the state treasurer with the approval of the governor and attorney general provoked considerable discussion. The debate in regard to adoption of this section may be found in Volume X, pages 367 through 405, Debates of the Missouri Constitutional Convention of 1875, edited by Loeb and Shoemaker and published by the State Historical Society of Missouri.

The proposal represented something entirely new and apprehension of the innovation was expressed as follows, pages 373-374:

Mr. Lay:

"I want to hear what will be said upon the subject. I will not make any factious opposition to it--not oppose it simply because it seems to me to be an experiment or innovation. But it does seem to me, the best mode is to leave this money in the hands of the Treasurer of the State, an officer whom the people have selected to control it, and be responsible for it. The people of course, have nothing to do with the banks, but by

the law, they select a man whom they believe to be honest, competent and responsible, to take charge of this money and give bond, and be responsible for it, and it does seem to me that the safe rule after all, will be to leave this money in the hands of the officers, chosen by the people of the State to control, and to make him responsible for its forth-coming whenever it is wanted. It seems to me to be a dangerous rule, sir, to recognize in this Constitution or anywhere else, the right of the Treasurer or any other officer of the State to loan out this money, or to deposit it, and draw interest on it, in any shape or form. I believe the safe rule will be found, the one we have already adopted. The Governor, I believe, is required to approve the bonds given by the Treasurer. He is responsible for that, and the blame will devolve upon him, of course, if he takes an insufficient bond, and I think it is better to leave it where it is now, in the hands of the Treasurer."

The chairman of the committee on revenue and taxation stated the purpose of the section as follows, pages 374-375:

"Mr. Letcher: Mr. President, The reason why the Committee prepared this section was, that we learned that there was a large amount of money paid in, about the month of January each year, to the State Treasury. A portion of that money was to pay the July interest on the public debt, and that there was in his hands also, what is called an Executors and Administrators fund, that that money remained in his hands from the month of January as a general rule, until about the month of July, when the July installment of the interest would fall due; the question was, what was done with that money? Does that money remain in the strong box as was stated yesterday, or is it put elsewhere? If it is put elsewhere, why is it put elsewhere? Now, we have no information, excepting common talk. We only learn that such things have been done; that it is a sort of custom, a sort of right claimed by the officers. I do not mean the State Treasurer, but I mean that I have heard it in regard to County Treasurers, that after giving

their bond to the county, for instance, for the safe-keeping and forth-coming of the money, when it was called for, that it was none of the people's business, what they did with the money in the meantime.

"Well, now, we are told that the State Treasurer can, by putting the money at St. Louis or Kansas City, from the deposit make a great deal of money in the course of six months or a year, enough money to set up one handsomely for life. Whether it is done or not, I do not know, and I presume none of the members of my Committee know; but we came to this conclusion, hearing this thing much talked of. There is a great deal of complaint about it, there is a great deal of hob-nobbing about political conventions, as to who shall get the nomination for Treasurer, and no person can see in the mere salary of that office, anything worth contesting so strongly for, and there must be some great power or leverage which makes this office so sought for. The object therefore of this section, is to give the Convention an opportunity, if it sees proper, to provide that those funds may be put in bank. Now, as to the question suggested by the member from Cole (Mr. Lay), as to which is the best plan, we do not pretend to say; but we submit this, that the money is just as safe to the State, upon a bond or security given by banks, to the satisfaction of the Governor and Attorney-General, as it is upon a bond given by the Treasurer and approved by the Governor."

The question of the critical need for safeguarding the state's moneys and the desirability of earning bonuses accruing to the state on the deposit of such moneys was discussed as follows, pages 376-378:

"Mr. Todd: I, for one, have an interest in this question and am prepared to speak to it. The question with me is this. Is it safe and prudent for this State to keep its revenues in the iron box in that room, just beyond the rotunda, with no guard unless it be a man or two, when the habit of brigandage, plundering and robbing throughout this country, has become on land, what pirates are on sea. They go in

bodies, in fives and tens, suddenly come upon a community, go into a small place, and by their surprise, force and audacity, they take possession of what they want, whether it be a store or a bank and get away with their plunder without any successful resistance. We have stopping of Railroad trains, not only here in the western states, but as occurred recently in Illinois and just beyond Utica in the State of New York; and unlike the sea pirate, who is confined to the vessel, these men are scattered like a band of Roderick Dhu's.

"They are Roderick Dhu's men. They can be called and come together in an instant, and throw themselves upon a point, overcome and plunder it, and you cannot catch them.

"Now, the theory is, that all the vast revenues of this State, from time to time, are kept in that safe. The Treasurer is responsible for them by his bond. Persons say they are not kept there, that they are put in banks, under an arrangement between the Treasurer and the proprietor of the banks, and under which arrangement the money is not so exposed, and that large profits are derived from it, that somebody receives. Of course, this is a rumor; I give it no credit. I go upon the theory of the law, which is that that money is there. Now, is it safe and prudent for this State to keep those revenues, sometimes in such large amounts, in that safe, in this lonely, isolated capital, with no protection, in the present condition of the country, or in any ordinary condition, and we know that the condition now is extraordinary, in regard to that. We know that even cities are not entirely free, but we must seek the greatest safety for our taxes. We here, are trying to protect the people against being overtaxed, and that sort of thing, and while we are doing this, let us make what we do take from them secure, if possible. Now, the question is whether the money shall remain, as I have said, according to the theory of our law, or whether we shall have it divided up, and put in places where there is greater security, and with responsible depositaries. * * *"

Pages 379-380:

Mr. Todd:

"We are intelligent men. Now we want to relieve the Treasurer of this high responsibility, and want our funds safe, and if, by placing them in a safe condition, we can accomplish two things, to-wit: The relief of the Treasurer and profit to the State, why not do it, and make them secure. Now that would be the effect of it. Banks of as high responsibility as any in the State can be got to be depositories. There is no question about that, and when they ask what would be the security, why it is the same as is taken from the Treasurer--a bond with sufficient security and that too, under the selection and approbation of the Governor and Attorney-General.

"You may do more, if you please, but this seems to be sufficient. Banks of well-established character, banks of entire responsibility so far as that can be judged of, becoming depositories. Is it not safer to put the money into banks in that way, than to leave it in that vault, because I am not going to take the supposition that the money is not in the vault. The supposition is that it is there, and the question with us is, shall it remain there or go into these banks. Then by putting it into the banks two things will be accomplished. Instead of the money being locked up in those banks, the country is having the benefit of it. It is being used by the banks like other things. The banks become responsible to us and give us a bonus, an unusual thing, and then give us a rate of interest for the deposit for 3 or 6 months, or on call, which is a common thing, and instead of the profit to the State amounting to \$20,000 or \$50,000 as the member from Caldwell (Mr. Holliday) has said, I reckon the profit would come nearer to \$100,000. This thing has been fought against in other States, sometimes with success and sometimes not with success. In Pennsylvania it has been fought against ever since Cameron became umpire of Pennsylvania. One charge against him was

that he laid out very large sums of money, threw his conscience to the wind and became a public robber. It was charged and not denied, that in order to keep control of the State of Pennsylvania that by some of his family, his son-in-law, or somebody else, he kept the treasury in his family, whose average deposit was some \$600,000; and this was in banks at the highest interest for the benefit of the son-in-law or other member of the family.

"That was worth to him, all that he laid out and immensely more--an immense investment, yielding a fortune every year. Mr. Cameron never hesitated for a moment to make money by any means in his power, and by reason of his corrupt practices, Mr. Lincoln turned him out of his cabinet. Now, how can we in the face of such a plain proposition, founded upon everyone's personal experience, keep the money in our vault, in our office safes, in our store safes, unless we took it after bank hours, in the City."

The theory of keeping the state moneys in a vault in the Capitol as opposed to the actual practice of the treasurer depositing the moneys for his own benefit was further discussed as follows, pages 388-389:

"Mr. Gantt: Mr. President, I suppose every one knows now, as said by my colleague, that the funds of the State, the revenues which are collected, are not kept in this room, in the lower story of this capitol; practically they are all kept in the vaults of certain banks, and practically, I suppose, nobody doubts that a certain emolument accrues to the person who selects those banks as a depository for this money.

"Of that, I suppose no one has any question, and the object of this section by the Committee, and of this amendment by the member from Caldwell, (Mr. Holliday) is to put the profit arising from the selection of the depository, and the interest upon the money while it remains deposited to the benefit of the State of Missouri, instead of leaving it a perquisite of the office of Treasurer. * * *"

The loss of revenue to the state by not earning on state deposits was discussed by Mr. Gantt as follows, page 396:

"We are told forsooth that this system has worked very well in the time past. I will tell the members of this Convention how well it has worked. We have regularly lost from \$50,000 to \$100,000 per annum in the interest which has been received, not by us but by the person who has had the handling of the public money and who has been prudent enough to secure this return. What is the use of our shutting our eyes to facts which are as notorious as these? The object of this substitute offered by the Committee is to secure that money for the State."

Although Mr. Gantt favored lawful depositaries for the state's moneys, it was his opinion that the responsibility for the depositary should rest solely with the governor and he offered an amendment to that effect as follows, pages 383-384:

"Mr. Gantt: I also express my concurrence in the substitute which has been offered to the section. I approve of the policy and general scope of the original section, but I like the substitute because it goes further in the same direction, but I hope some amendment will be made and I propose to offer one which I will have read, for the purpose of information, at this state. I propose to

Amend the substitute by striking out the word 'he' in the 9th line and inserting in place of it 'Governor of the State' and strike out the words 'approval of the Governor and Attorney-General' in the 10th and 11th lines, so that it will read 'that the monies are to be deposited in such bank or banks as the Governor of the State may select';

"and then, it will go on,

'and that the banks will give such security as may be approved by the Governor and Attorney-General.'

"I prefer this mode because the Governor, if one of his functionaries makes a selection, may not entirely approve of the selection, and still may have some delicacy in disapproving it. I would put the responsibility of the selection upon the Governor himself, for naturally, as is suggested by the member from St. Louis (Mr. Brockmeyer) when the selection has been made, and bond taken from the bank and the money has been paid by the Treasurer to such bank, that will be an exoneration of the Treasurer, from all further responsibility in respect to that money, until it is drawn out by the Treasurer again. * * *"

and again on page 386:

"* * * I want to put the responsibility upon the Governor to give him the untrammelled right of selection, he and the Attorney-General afterwards, to be the judges of the security which shall be given by the banks selected. * * *"

Objection to the proposal to give the governor sole responsibility for the designation of depositaries was expressed as follows, page 387:

"Mr. Hammond: I am opposed to the amendment. I do not see any good reason why the Governor should select the place of deposit for the monies of the State, in place of the Treasurer. I suppose the people of the State in selecting a Treasurer, select him somewhat with a view to his qualifications for that office, and the duties of that office are peculiar to it alone, and in the selection of the Governor, they will select him with a view to the duties of the Governor's office. Therefore, it does seem to me, that it is out of place, this innovation; and then, so far as the objection that was urged by the Chairman of the Committee, is concerned, that it would perhaps relieve or do away with this electioneering that has existed heretofore, in the Conventions, to secure the office of Treasurer, the effect of it, it seems to me, would be to transfer all that to the selection of the Governor. If these deposits are so desirable, as members seem to think they are, why the whole thing would be just thrown around

on the Governor, and we would have the Governor and Treasurer in one. I am opposed to the amendment."

Further opposition was expressed as follows, page 391-392:

"Mr. Lay: The remarks which I have made before, were on the section as reported by the Committee. I now desire to make a few remarks upon the amendment offered by the member from St. Louis (Mr. Gantt). That amendment provides that the Governor shall select the banks or depositories in which it is proposed to deposit the money of the State. It transfers the selection from the Treasurer to the Governor. Now, sir, the selection of these banks is the important matter in this whole thing. The important point in the whole thing is to guard properly this proposed plan when it goes into practical operation. The important question then upon the amendment of the member from St. Louis (Mr. Gantt) is, whether the Governor be the safer party, or the Treasurer, to entrust with the right of making the selection of these depositories. Upon that point I suggest this, sir; the member from Chariton (Mr. Hammond) has already suggested, that in the first place, the Treasurer is a man selected for this purpose by the people, and that he ought to be better qualified than anybody else; but acknowledging that presumption, if you please, then here is another consideration. The Treasurer gives a bond not only to account for and pay over, the monies he receives, but he gives a bond in general terms, to discharge faithfully the duties of his office. One of the conditions of his bond under the operation of this law would be, that he should faithfully discharge the duties of his office. That would cover also the selection of the depository. Now sir, if in the selection of this depository he selected an insolvent, worthless bank as the depository, the people would have some recourse on him on his official bond."

Mr. Lay also expressed his opinion as to the actual functioning of the section proposed by the committee as follows, page 394:

"* * * Why, sir, if the Treasurer selects a good solvent bank, the chances are that the Governor and Attorney General will approve his selection; there will be no reason why they

should not do so.* * *

The following comments were made by Mr. Gantt in his rebuttal remarks to the arguments against his amendment to make the governor solely responsible for the selection of depositaries, page 397:

"* * *But as I said, the object of the amendment was to enable the Governor who is necessarily a man of character and dignity, or presumed to be such a man, whose character ought to be a pledge of integrity, and whose position ought to be a pledge of integrity, to give him the selection of the bank. But when the bank is thus selected suppose it to be a bank whose solvency is questionable, will not the Governor and Attorney-General have to approve the sureties when they are taken? To what other officer will you confide the task of approving of these sureties? If you will designate any officers who will be likely to prove more praiseworthy, I, for one, will acquiesce in them with pleasure. It was for the purpose of placing the responsibility upon the Governor and making him free from all suggestions of delicacy as to making an objection to the selection of the Treasurer, that the amendment was offered. As to the likelihood that the Treasurer will make more than before, or anything, under the new arrangement, I cannot see how it can be, for one moment. How can he? I take it that the details of this matter will be regulated by law, but if it were not, that the Governor would be bound, if he values his own reputation to select that depository which was of the best credit and offered the highest premium with good security. In other words, that the matter of the custody of those funds must be given to the highest and best bidder, and all this will have to be done in the face of day, and if anybody makes money then, the State can see it and condemn it. If anybody makes money now, it is all done in a corner, and nobody sees it except those who see, feel and touch the money.
* * *

Mr. Gantt's amendment was rejected by the convention, (page 402) and the section as it appears in the constitution authorizing the treasurer to select depositaries with the approval of the governor and the attorney general was adopted (page 405).

The section was adopted by a vote of 46 to 13. Some members of the convention were absolutely opposed to the principle of designating banks as depositaries for the state's moneys. One particular opposing speech is interesting when considered in the present day context as follows, pages 398-400:

"Mr. Bradfield: I desire simply to say in explaining my vote, on the question now before the Convention, that I have not yet been convinced of the propriety of departing so radically from the rule that has prevailed in this State, in regard to public monies. Now, I think there is a far greater and more important question involved in the subject matter under consideration than as to whether the State shall receive the benefit of the interest or bonus, accruing from the funds of the State Treasury, or which shall go to the Treasurer. The mere question is now, whether the State of Missouri shall be separate and divorced from the banks of the State or not. Now, sir, I am as much opposed to a union between the banks of the State and the State itself, as I am to the union between Church and State, and I would just as soon see an established religion in the State of Missouri, as I would see the State of Missouri under the control of the banking corporations of this State.

"Now, if the substitute as offered by the member from Caldwell (Mr. Holliday) prevails, what will it amount to? 'The whole revenue of this state' --it does not confine it to the subjects of revenue prescribed in the Report of the Committee--but 'the whole revenue of the State.' Two million dollars received from the hard earnings of the people of this State are to be deposited in some one bank or more of this State to be drawn out upon checks by the Treasurer of the State. Suppose that this Convention adopt the amendment proposed by my friend from St. Louis (Mr. Gantt) which leaves the selection of the bank in the hands of the Governor, giving him the power to designate the bank, what more corrupting and demoralizing influence can be thrown around the Chief Executive Officer of this State than such a proposition as that would throw around him. You leave the selection of the Governor of this State in the hands of the banking corporations. There will be fights between them as to who shall be Governor. You might as well dispense with your party conventions and just let the Directors of the banks of this State select your Governor. Or if you leave it to the Treasurer select your Treasurer. I say it is corrupting and demoralizing in its influence over the officers

of the State. Now so far as the argument of my friend from Cole (Mr. Lay) is concerned, I know no difference between the Treasurer of the State and the Governor: and the Governor is just as likely to be swayed by corrupt and improper influences as the Treasurer. So far as dollars and cents are concerned, if your Treasurer makes the profit now out of the money in the Treasury, he will make it then. He will take a bonus outside of that which is to be paid into the State Treasury.

"In the selection of the bank there will be bids, and unless there is something more than human nature in the Governors to be selected by this State, they will be placed at the mercy of the highest bidder, and probably they will get men in the Gubernatorial chair and in the Treasurer's office, who will be bought and sold like hogs, at so much a pound. Now, I am opposed to anything so demoralizing in its influence and tendencies as that. I hold that not one cent of profit should be derived to the State from any money drawn from the people by taxation, undisposed of, in the State Treasury. I would be in favor of engrafting, if necessary, in this Constitution, that any officer of this State, who directly or indirectly receives one cent of profit, shall be convicted of felony and put in the penitentiary. I am opposed to drawing one cent of money from the people of the State and putting it in the bank or in the Treasury, that is not needed for the absolute wants of the State. I want no surplus funds in the Treasury. I want nothing more received from the people than is absolutely necessary to meet the current expenses, and if there is an accumulation of money in the Treasury, I say you had better adopt a plan by which it will remain in the hands of the people instead of requiring them at a particular season to pay all the money into the Treasury.

"Let them hold it and pay it in installments, in order to meet the wants and necessities of the State.

"I think there is a very important and grave principle involved in this proposed change,

and I shall vote against all amendments and the section when it is presented for these reasons."

CONSTITUTION OF 1945

As has been noted above, the constitutional convention which drafted the Constitution of 1945, received and considered a recommendation that the executive offices of the state be set up on a cabinet form of government. The governor of course would be an elected officer. He in turn would appoint most of the other significant state officers as members of his cabinet, and both the state treasurer and the attorney general would be appointed by the governor. However the state auditor would remain an elected official.

Therefore, the section on designation of state depositaries was changed to provide that the banking institutions would be selected by the treasurer and approved by the governor and auditor. The auditor was substituted for the attorney general as an approving party because the committee which drafted the section felt that the two approving parties should be elected officials. If the section remained as it was in the old constitution, selection would be made by the treasurer and approval by the governor and attorney general. Inasmuch as the treasurer and attorney general would both be appointed by the governor, the designation of depositaries would in effect be made by the governor.

Discussion of this section is found in the Constitutional Debates, pages 2459 - 2472, pages 3279 - 3280 and page 3600. Judge Mayer, a delegate to the convention from St. Joseph, offered an amendment to strike the auditor from the section as an approving party. It is apparent from his discussion that he considered the designation of depositaries to be the joint action of the three officers and that inasmuch as the treasurer would be appointed by the governor, the auditor would always be outvoted in the designation of depositaries. The following excerpts from the debate reflect such thinking.

Page 2460:

"Mr. Mayer: Doctor, I notice that the Treasurer shall appoint, shall deposit this money with the approval of the banks approved by the Governor and the State Auditor. And also, I suppose this File contemplates the appointment of the State Treasurer, does it not?"

"Mr. McCluer: Yes.

"Mr. Mayer: Well, if it does why put the Auditor in who is elected? He will have nothing to say about it. The Governor will appoint the Treasurer and the Governor and the Treasurer will decide where the money goes. Now, why divide the responsibility by putting the auditor in and practically have no vote?

"Mr. McCluer: Well, it was our thought that the auditor is the check upon the financial administration. It would be a proper officer to be consulted in making this deposit.

"Mr. Mayer: Well, but he is an accounting officer, is he not and, after all, if the treasurer appointed by the Governor and the Governor and the treasurer are going to approve the bank, why divide the responsibility? Why not let them do it and be responsible for it? Why drag in an elective officer who will really have nothing to say about it?

"Mr. McCluer: I have no great objection to that but I also think it is reasonable for them to consult the auditor."

Page 2465:

"Mr. Mayer: Mr. President, I have not made up my mind fully, therefore, I want to vote on the cabinet form of government but if we are going to have a cabinet form of government we ought to have one. If the Governor's going to appoint all these people he ought to appoint them and he ought to be responsible for them. The theory of the cabinet form is to elect a Governor and hold him responsible. Now, why drag in the State Auditor who won't really have a vote? He is the only one who won't be included in the cabinet form. He is the one who is to be elected. Now, why put him in with two cabinet members to vote? I don't know. It simply divides the responsibility. If we are going to have a cabinet form, let's put the responsibility on the

Governor where it belongs. Further more, as I understand it, the Executive File, if it is adopted, provides that the duties of the Auditor shall be limited to auditing. It is the only duty he can have -- auditing. As I understand, that is all he can do. The Legislature is forbidden to impose any other duty upon him. Therefore, I don't think he ought to have any duty with reference to the depositing of these funds."

Page 2467 - 2468:

"Mr. Moore: May I inquire? Do you think that it is good public policy to vest the sole power in one man to select the depositories of the state money?

"Mr. Mayer: Well I think, as a matter of practice, he does it all of the time anyway.

"Mr. Moore: Well, haven't we had some experience of that in the last few years of spreading the money out because of the three officers forcing it? I don't know whether that is true or not.

"Mr. Mayer: I don't know about that. If that's true, I never heard of it, but may I say this in answer to your question. Whoever you are going to have you ought to have in the Governor's cabinet, if you are going to have a Governor's cabinet. Why say the Governor and the Treasurer, if the Treasurer is to be appointed by the Governor, and the Auditor. The Treasurer, if he is appointed by the Governor, he is removable at the Governor's will and of course he'll vote with the Governor on the deposits. Now why drag the State Auditor in to take part of the responsibility.

"Mr. Moore: I agree with you on your premise, Judge, that if the Treasurer is an appointee of the Governor and he selects the Depository, that will be a selection made by the Governor and if we are going to have a Treasury . .

"Mr. Mayer: (Interrupting): Then, let him take the responsibility and don't drag the Auditor into it."

Page 2468:

"Mr. Mayer: I should like to ask him a question first. Well, if it is offered as a substitute rather than as an amendment to my amendment, Judge Park, then you still leave the Auditor to determine, to join in determining what banks shall be depositories.

"Mr. Park: I don't care who determines that.

"Mr. Mayer: Do you think the Auditor and the other two appointed officers should be in it?

"Mr. Park: It wouldn't make any difference regardless of whether he is an elected or appointed officer.

"Mr. Mayer: What vote would you have? The other two could always outvote him. The Auditor is appointed by the Governor and removed at the will of the Governor. Now why not let the Governor take all of the responsibility?

"Mr. Park: The Governor and the Treasury could do it.

"Mr. Mayer: That's my motion."

The only challenge to Judge Mayer's thinking that designation of depositories was the joint action of the three parties was by Mr. Shepley as follows, page 2469:

"Mr. Shepley: Judge, as I read this section here, it would not put the State Auditor in the position of being outvoted. It would actually require his approval and if he, am I wrong in my understanding that if the State Auditor disapproves, the depository cannot be used?

"Mr. Mayer: Well, I don't think the vote has to be unanimous. I assumed that a majority of them could determine it.

"Mr. Shepley: Well it reads here, 'with the approval of the Governor and the State Auditor.' Now it occurs to me with the meaning of that, it would require the approval of both of those

officials, the Treasurer of the selected bank or trust company, but then he would have to get according to this, the approval of the Governor and the State Auditor. Would you still, the real point of my question is, would you have any objection to leaving the Auditor in there if actually he is in a position to prevent the deposit of money in a bank which he did not approve?

"Mr. Mayer: No."

Former Governor Park was a delegate to the convention and he supported a substitute amendment similar to the one offered by Judge Mayer. However, it appears that Governor Park intended that his amendment should be applied to the approval of securities by the depositaries rather than to the designation of the depositaries.

Action on the amendments and on the section itself, was deferred by the convention until after the question of the cabinet form of government had been disposed of. Subsequent action by the convention rejected the cabinet form of government and the treasurer, auditor and attorney general, all remained elected officials.

At a later session, Dr. McCluer, Chairman of the committee which drafted the provision concerning depositaries made the following comment in regard to the committee's reasons for substituting the auditor for the attorney general, page 3279-3280:

"Mr. McCluer: The reasons for including the auditor rather than the attorney (general) were two. One, that under the files then before the convention, the auditor was elected an officer. And two, the auditor deals with fiscal matters and the deposit of the funds relating to financial matters we thought might be decided upon by the governor, the auditor and the treasurer, rather than by the governor, his legal advisor for the peoples attorney and the treasurer."

At a later session, Judge Mayer and Governor Park both withdrew their amendments and the section was adopted by the convention without further comments on the substance (3600).

Although there is no discussion on the subject in the Constitutional Debates, it is noted that the section proposed by the committee and adopted by the convention eliminated the provision included in the Constitution of 1875 in regard to the payment of bonuses by depositaries. The bonus provision was eliminated because at that time banks were prohibited from paying interest on demand deposits. The prohibition on the payment of interest on demand deposits was one of the consequences of the bank failures which followed the financial bust of 1929. In 1956, the constitutional provision was amended to provide for the investment of surplus state moneys in time deposit or government securities.

DISCUSSION

I.

The designation of the depositaries for state moneys is made by the selection of the treasurer and approval by the governor and the auditor pursuant to the constitutional provision. Certain conclusions can be drawn from a study of the debates at the constitutional conventions which produced the Constitutions of 1875 and 1945.

The primary responsibility for the designation of depositaries is in the office of the state treasurer. It seems clear from a study of the constitutional debates that the delegates to the conventions which produced the Constitution of 1875 and the Constitution of 1945 intended that the state treasurer was to possess principal responsibilities in the depositary designation through his power of selection. References to the peculiar duties of the treasurer as the custodian of the state's money and references to the fact that the qualifications of an individual to perform these duties are the particular facts which the people will weigh in choosing this officer, make it clear that the delegates to the convention intended that he should play the principal role in choosing the places of deposit for the state's money. It was expected that the treasurer would be a person familiar with the field of finance and capable of exercising intelligent judgment in regard to sound banking institutions for the safekeeping of the state's funds. The first concern of the delegates to the convention of 1875 was to adequately safeguard the state's moneys. The second concern of the delegates was to deposit the moneys in institutions which would produce the greatest bonuses or interest to the state in the way of additional income. It was intended that the treasurer would be best qualified to accomplish these purposes. It also seems clear that the convention intended for the treasurer to take these two factors into primary consideration in selecting depositaries.

The intention of the constitutional conventions to place the principal responsibility for the designation of the depositaries in the hands of the treasurer is also indicated from amendments proposed in each convention. Efforts were made in each convention to make the governor the principal officer responsible for the designation of depositaries and such efforts were rejected.

II.

The power and duty of the governor in regard to the designation of depositaries has been examined with reference to authorities from other jurisdictions for assistance in arriving at a sound conclusion. Research by this office has not revealed cases so similar in facts and law to be of persuasive influence.

The designation of depositaries by selection of the treasurer and approval of the governor and auditor can be viewed as the joint authority of three persons.

Section 1.050 RSMo 1959, provides as follows:

"Words importing joint authority to three or more persons shall be construed as authority to a majority of the persons, unless otherwise declared in the law giving the authority."

Thus, selection by the treasurer and approval by either the governor or auditor would be sufficient to lawfully designate depositaries. This theory is given some weight by the Constitutional Debates of 1945. The theory is also supported to some extent by *In Re State Treasurer's Settlement* (also cited as *Bartley v. Meserve*), Neb., 70 N.W. 532 (1897). The Nebraska law required state depositaries to secure deposits with bonds " * * * approved by the governor, secretary of state and attorney general." Depository bonds were approved by the secretary of state and attorney general, but not by the governor. In upholding the lawfulness of the security the court stated:

" * * * it was not necessary that all three of the state officers should have concurred in the act of approving said bonds, but that the act of the majority was sufficient, all of them having met and conferred together. The rule is well settled that where authority is committed to three or more persons to perform a public duty or trust, if they all meet

for the purpose of executing it, a majority may decide."

State v. Zimmerman, Wisc., 196 N.W. 823 (1924) is further support for the "majority action" theory. Under a statute providing for expenditures of emergency appropriations "* * * upon the certification of the governor, secretary of state and state treasurer, * * *" certification was refused by the secretary of state. The court held that certification by the other two officers, being a majority, was sufficient. Both of the above cases proceed upon the theory that the authority exercised was in the nature of action by a board.

Contrary conclusions were reached in Ellison v. Oliver, Ark., 227 S.W. 586 (1921). The constitution provided that printing contracts "* * * shall be subject to the approval of the governor, auditor and treasurer." The treasurer had not approved a contract approved by the other two officers. The court held that the separate approval of all three officers was required. This theory is supported by State v. Marron, N.M., 137 P. 845 (1913).

Although it is tempting to follow the "majority action" theory (the apparent existing impasse would thus be avoided), the principles of constitutional construction alluded to earlier in this opinion preclude the application of this theory to the provision under consideration. Mindful that words have been employed in their natural and ordinary meaning and that no forced or unnatural construction is to be placed upon the language, it must be concluded that two distinct and separate powers are exercised in the designation of depositaries: selection by the treasurer and approval by the governor and auditor. The approval power must be exercised by each of the officers in whom it is vested to effectuate a valid depositary designation upon selection being made by the treasurer. While the constitutional language makes no reference to disapproval by the governor or auditor yet disapproval would seem to be implied. Disapproval by either the governor or auditor is a veto and prevents depositary designations as contemplated by the constitution.

Mindful also that attempt should be made to arrive at the true purpose, spirit and intent of the instrument, it should be noted that the constitutional provision contemplates approval by the governor and auditor when the treasurer selects banking institutions, sound in capital, management and facilities and capable to service the complexities of the state's financial affairs. As noted in the Constitutional Debates "* * * there will be no reason why they should not do so. * * *"

In his letter to the governor dated February 23, 1965, the state treasurer declined to comply with the governor's request to submit for approval or disapproval depository selections different from those previously submitted and not approved by the governor. The treasurer noted that the governor had not expressed the reasons for his disapproval of the prior selections and took the position that he was under no duty to make further selections if the governor's approval was arbitrarily withheld.

However, it must also be noted that disapproval by the governor of a depository selection is not open to judicial inquiry. In *State ex rel Major v. Shields*, 198 S.W. 1105, the court stated as follows:

"* * * the governors duties devolve on him by law, under a higher authority than the order of a court--i.e., the mandate of the constitution. The duties thus conferred are political, and his actions are entirely independent of the judiciary, and for a failure to perform same, he is responsible to the people alone; his liability being that of impeachment."

See also *State ex rel Robb v. Stone*, 120 Mo. 434, 25 S.W. 376; and *Annotation, Mandamus to Governor*, 105 A.L.R. 1124. Thus the governor may disapprove (or veto) the selection of a depository without giving any reason therefor, and he is answerable for such action only to the people.

III.

As previously discussed, in the designation of state depositories the constitution has delegated the primary responsibility to the treasurer. The treasurer is the custodian of all state funds and in this constitutional capacity his custody is exclusive. Depositories must be banking institutions selected by him and approved by the governor and auditor. The constitution declares in clear and positive language that all state funds shall be deposited by the treasurer in banking institutions immediately upon receipt thereof. However, deposit of state funds cannot be made in banking institutions that have not been approved by the governor or auditor. The constitution is silent on the effect of disapproval by the governor or auditor or what is to be done if either of them disapproves; yet sound and cogent arguments can be advanced that the constitution implies that the treasurer should submit further depository selections for approval. It is of course

at once apparent that the process of submitting depositaries for approval could be repeatedly disapproved by either the governor or the auditor and this could likewise result in a stalemate.

On the other hand if the constitution should be construed to mean that disapproval was not contemplated; or that disapproval by the governor or auditor does not imply that the treasurer should submit further depositary selections, then the framers of the constitution left a complete void on the subject.

Nevertheless, the duties of the treasurer upon the disapproval or veto of depositary selections must be examined in view of the availability of judicial process to review, compel or coerce his actions.

A.

It has been concluded above that the disapproval or veto by the governor of a depositary selection is not open to judicial inquiry. The foreclosure of judicial inquiry in regard to actions by the governor is based upon the Constitution of Missouri, 1945, Article II, Section 1, which provides for the separation of powers as follows:

"Three departments of government-- separation of powers.--The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

Article IV, Section 1, of the Constitution provides that the supreme executive power be vested in the governor. In his capacity as supreme executive he is absolutely free from any and all interference by the legislative and judicial departments of the government pursuant to Article II, Section 1.

The state treasurer is a constitutional officer who shares with the governor some of the supreme executive power. The extent to which the state treasurer is free from judicial or legislative

interference by reason of his position as a constitutional officer has not been determined by the courts. Executive officers other than the governor, including the treasurer, are subject to judicial process in the performance of duties purely ministerial in nature.

An excellent commentary concerning the power of the judiciary in relation to the executive department is found in 14 Am. Jur. 392-394 as follows:

"In the consideration of the power of the judicial department to pass on the acts of the legislative and executive departments, it is necessary to distinguish carefully the power of the courts to control the legislative or executive department by restraining or mandatory writs and the power of the court to review an act of either department when properly presented in a judicial proceeding. It is generally recognized that every act done or attempted to be done by any officer of the executive department in his official, and not in his individual, capacity, is shielded from all judicial interference or control, either by mandamus or injunction, even though such act may be founded in an error of judgment or an entire misapprehension of the official duty under the law. In other words, so long as a public governing body acts within the limits of its legal powers and jurisdiction, the exercise of its judgment and discretion is not subject to review or control by the courts at the instance of citizens, taxpayers, or other interested persons, in the absence of a statute authorizing such review or control. The courts have no general supervising power over the proceedings and actions of the various administrative departments of the government and will not interfere with conclusions of the executive department, fairly arrived at and with substantial evidence in support, and in the bona fide exercise of its discretion, whether the action is upon mixed questions of law and fact, or of law alone, until the final accomplishment of matters pending before them. Thereafter, the courts may be invoked to inquire whether the outcome of executive action is in accord with the laws of the country. The actions of the executive

department will not, however, be disturbed, except for fraud, alleged and proved; or where it is necessary to determine conflicting rights of private litigants, where a specific duty is assigned by law, and individual rights depend upon its performance, since courts may control ministerial acts by writs, mandamus, or restraining order; or where an action is beyond the scope of executive authority, such as the execution of an unconstitutional statute to the irreparable injury of a party in his person or property.

"In accordance with the general rule the courts will not interfere with executive action relating to executive, administrative, political, military, naval, international, or territorial matters, and matters relating to immigration, internal revenue, the enforcement of law, or the removal of officers."

In *State ex rel Johnson v. Regan*, 76 S.W.2d 736, 1.c. 741 the court commented upon the separation of powers doctrine as follows:

"[3] It has long been the settled law of this state that our courts will not interfere with either of the co-ordinate departments of government in the exercise of their powers, except to enforce ministerial acts required by law that leave to the officer no discretion. *State ex rel v. Meier*, 143 Mo. 439, 45 S.W. 306."

B.

Cases construing the extent of the exercise of judicial authority in regard to actions by officers of the executive department arise to a large extent by mandamus. One of the leading cases on this subject decided by the Supreme Court of Missouri is *State ex rel Gehner v. Thompson*, 293 S.W. 391. The court held that mandamus will lie against a public officer to compel the performance of a mere ministerial act, but will not lie to control a discretionary power. In the cited case, mandamus was sought against the state auditor to compel him to audit and approve for payment the claim of the assessor of the City of St. Louis against the state for certain statutory fees claimed to have been earned. In denying mandamus the court

found that the duties of the auditor in regard to the claim were discretionary and stated as follows, l.c. 398:

" * * * For us to control or direct respondent's quasi judicial discretion (absent an arbitrary and clearly unlawful, or unjustifiable, action on his part) would mean for this court to impose our own judgment and discretion for that imposed upon respondent by the legislative department of this state, the assumption and arrogation of which power on our part would be to render abortive and ineffectual the statute prescribing the powers and duties of the state auditor.

"[3-5] The rule is general that the applicant for relief by mandamus must prove that he has a clear, unequivocal, specific, and positive right to have performed the thing, or action, demanded, and the remedy by mandamus will not lie, if the right is doubtful. State ex rel. v. Dickey, 280 Mo. 536, 548, 219 S.W. 363; State ex rel. v. Stone, 269 Mo. loc. cit. 342, 190 S.W. 601; State ex inf. v. Gas Co., 254 Mo. loc. cit. 532, 163 S.W. 854. Furthermore, a ministerial duty may be enforced by mandamus only when it is shown that the duty is one in respect to which nothing is left to discretion. State ex rel. v. Hudson, 226 Mo. 239, 265, 126 S.W. 733. * * *"

The authority of the judiciary to compel executive officers (with the exception of the governor) to perform ministerial duties is well established in the State of Missouri. In State ex rel Folkers v. Welsch, 124 S.W.2d 636, the St. Louis Court of Appeals by mandamus compelled the building commissioner of the City of St. Louis to grant a permit to the relator for the erection of a gasoline filling station. The court described a ministerial act as follows, l.c. 639:

"* * * A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of legal authority upon a given state of facts being shown to exist, regardless of his own opinion

as to the propriety or impropriety of doing the act in the particular case. State ex rel. Jones et al. v. Cook, 174 Mo. 100, 118, 119, 120, 73 S.W. 489."

In State ex rel S. S. Kresge Co. v. Howard, 208 S.W.2d 247, the Supreme Court by mandamus compelled the state comptroller to certify a claim for payment to the state auditor upon the grounds that the action required of the comptroller was a positive ministerial duty not involving an exercise of discretion. In State ex rel. Reorganized School Dist. No. 4 of Jackson County v. Holmes, 231 S.W.2d 185, the state auditor was compelled by mandamus to register and certify school district bonds. The question as to whether mandamus was a proper remedy is not discussed, but it is apparent that the duty of the auditor being compelled by the court was a ministerial action not involving discretion on the part of the officer.

C.

However, as a general rule, mandamus may not be employed to require the performance of a discretionary duty. State ex rel Kavanaugh v. Henderson, 169 S.W.2d 389, l.c. 392. Although the writ may not compel the performance of a discretionary act, mandamus may be employed to put an officer in motion to perform a discretionary duty. Thus in State ex rel Best v. Jones, 56 S.W. 307, l.c. 309, the court stated the rule as follows:

"Where a discretion is vested in a public officer, the courts will by mandamus compel the officer to exercise that discretion, but will not direct how it shall be exercised, or what conclusion or judgment shall be reached."

In the cited case, relators sought mandamus against the directors of a school district to require the directors to establish and construct additional schools. The court found that mandamus as requested would result in interference by the courts with the discretion of the directors and thus the writ was denied. In other leading cases which enunciate the principle that mandamus will require an officer to exercise discretion, the courts have been reluctant to issue the writ. Thus in State ex rel Schulz v. Fogerty, 195 S.W.2d 908, mandamus against the mayor and other officers of University City to compel the issuance of a special tax bill was denied; in State ex rel Gehrig v. Medley 28 S.W.2d 1040, mandamus against directors of a school district to compel the erection of a school building was denied. In State ex rel LeShure v. O'Hern,

149 S.W.2d 914, mandamus against the prosecuting attorney of Jackson County to lend his name to an information in quo warranto against the city manager of Kansas City, Missouri, was refused. However, in State ex rel Shartel v. Humphreys, 93 S.W.2d 924, mandamus was issued at the relation of the attorney general and the State Board of Health to compel the officers of Maplewood and Richmond Heights to abate a public nuisance arising from open sewage in these communities.

Exhaustive research by this office has not revealed any case in which a constitutional state elective officer has been subject to judicial process in the performance of discretionary duties. It appears that these constitutional officers have never been compelled or coerced by the judiciary in the exercise of discretionary functions, either by way of directing the manner of performance of a duty, by directing that the discretion be exercised one way or the other, or by review upon allegations that the discretion had been exercised arbitrarily or capriciously. Cases against these state officers appear to be limited to the area of ministerial acts.

D.

The constitutional powers under examination involve selection by the treasurer and approval by the governor and auditor. If it may be assumed arguendo that the treasurer may be compelled by judicial process to exercise the power of selecting depositaries under a given fact situation, the selection might meet with the approval of the governor and the disapproval of the auditor. The governor's act of approval is not subject to judicial inquiry as noted above. However, if the treasurer can be compelled to exercise his discretion in making selections, the legal theories which support such compulsion would provide for judicial examination of the act of disapproval by the auditor on the grounds that the discretion was arbitrary and capricious. As noted in State ex rel Shartel v. Humphreys, 93 S.W.2d 924, 1.c. 926:

"* * * But such discretion cannot be arbitrarily exercised, that is, exercised in bad faith, capriciously, or by simple ipse dixit. When so exercised, it is regarded that there was no discretion, recognized by law, and in such case mandamus will lie. * * *"

However, other legal principles examined by this office indicate that the writ will not lie against the treasurer and the auditor in the exercise of their powers designating depositaries inasmuch as it will not lie against the governor. A general rule is stated in 34 Am. Jur. 919 as follows:

"* * * If the act sought to be enforced cannot be made effectual by the rest of the board without the concurrent action of the governor, the writ will not issue against them alone."

The principle is discussed in more detail in an annotation found at 105 A.L.R. 1140, as follows:

"However, if the writ will not lie against the governor, mandamus has been denied where it would be ineffective unless it also ran against him.

"In a Louisiana case in which mandamus was refused to compel the governor and other members of a board of liquidation to assemble and take action upon the bonds of the relator and decide whether they were fundable in state bonds, the court reasoned that whenever by the Constitution and laws the state executive officers are vested with discretionary functions in their performance of civil duties, or political powers and responsibilities are conferred upon the executive department as a whole, the members thereof are likewise exempt from judicial control, although some of the officers, in the performance of their ordinary official duties, might be amenable to mandamus. * * *"

Although the principle is neither supported nor refused by Missouri authorities, cases of other jurisdictions in support thereof are as follows: *People ex rel Bruce v. Dunne*, 258 Ill. 441, 101 N.E. 560, 1.c. 565; *State ex rel Latture v. Board of Inspectors*, 114 Tenn. 516, 86 S.W.319; and *State ex rel Hope v. Board of Liquidation*, 42 La. Ann. 647, 7 S. 706. It is interesting to note that in the Louisiana case the court relies to some extent on the theory that the other officers shared the supreme executive power of the state with the governor in the matter which required their action.

Some support is found for the theory that mandamus will lie against state officers as members of a board in the performance

of a discretionary duty even though the governor is a member of the board. In *Huidekoper v. Hadley, et al.*, 177 Fed. 1, the United States Circuit Court of Appeals for the 8th circuit issued mandamus against all of the members of the Board of Equalization of the State of Missouri, except the governor, compelling the board to discharge certain duties. By provisions of the constitution the Board of Equalization consisted of the governor, state auditor, state treasurer, secretary of state and attorney general. The case is distinguished from the application of the principle under discussion inasmuch as four officers of the board, excluding the governor, were subject to the writ and a majority of the board or three officers could perform the duties of the board. Therefore, the writ was effectual without the concurrent action of the governor.

E.

This discussion in regard to possible judicial compulsion or coercion against the state treasurer in the exercise of his power of selection in designating state depositaries has centered around the theory of mandamus. Other possible judicial remedies are declaratory judgment and injunction. Most of the basic principles discussed herein in regard to mandamus apply as well to these remedies. In *State ex rel Shartel v. Westhues*, 9 S.W.2d 612, the discretionary action of the secretary of state was under injunction of the circuit court. In quashing the writ, the court referred to the separation of powers provision of the constitution and declared that the exercise of discretionary powers by public officials cannot be controlled by injunction. In *State ex rel State Highway Commission v. Sevier*, 97 S.W.2d 427, the Supreme Court made absolute a provisional rule in prohibition against the Circuit Court for interfering with the ordinary functions of the executive department of the state government by injunction. In *Selecman v. Matthews*, 15 S.W.2d 788, the Supreme Court affirmed the circuit court in refusing to enjoin the State Highway Commission, finding that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of judgment and discretion which the law reposes in him as a part of his official duties. It is specifically noted that the law reposes the discretion in the officer and not in the courts.

F.

Further examination of authorities discloses that judicial process, if available against the treasurer in exercising his

power of selection in designating depositaries, must be invoked by a party entitled to relief. The cases cited in regard to mandamus make it clear that the remedy is available when personal or property rights are being withheld or infringed upon by the refusal of the public officer to perform his duty. Thus in *State ex rel Folkers v. Welsch*, supra, the building commissioner of the City of St. Louis had refused to grant a permit to the relator, for the erection of a gasoline filling station. In *State ex rel Shartel v. Humphreys*, supra, the attorney general and the State Board of Health brought the mandamus proceeding on behalf of the general public to abate the nuisance of noxious open sewage and to protect the health of the community. Injunction will issue only to prevent or to correct irreparable injury. In *Jacobs v. Leggett*, 295 S.W.2d 825, l.c. 834, the court discussed the availability of declaratory judgment as follows:

"[14,15] The Joplin case further lays down these standards by which the instant case must be judged, 161 S.W.2d loc. cit. 413: 'But, when it is attempted to be so used and a judicial declaration is sought the court must be presented with a justiciable controversy--one appropriate for judicial determination--a case admitting of specific relief by way of a decree or judgment conclusive in character and determinative of the issues involved. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A.L.R. 1000; *Anderson, Declaratory Judgments*, Sec. 8, p. 27; 16 Am. Jur., Sec. 46. There must be a sufficiently complete state of facts presenting issues ripe for determination before a court may declare the law.

"A mere difference of opinion or disagreement or argument on a legal question affords inadequate ground for invoking the judicial power." *Borchard, Declaratory Judgments*, p. 77; *State ex rel. La Follette v. Dammann*, 220 Wis. 17, 264 N.W. 627, 103 A.L.R. 1089.'

"In *State ex rel. Chilcutt v. Thatch*, 359 Mo. 122, 221 S.W.2d 172, loc. cit. 176, we stated: '* * * the question presented must be appropriate and ready for judicial decision. [Citing cases.] Plaintiffs' petition must present a real and substantial

controversy admitting of specific relief through a decree of a conclusive character, as distinguished from a decree which is merely advisory as to the state of the law upon purely hypothetical facts.' See also Cotton v. Iowa Mut. Liability Ins. Co., 363 Mo. 400, 251 S.W.2d 246, 249."

It has not been suggested to this office that personal or property rights or other injuries recognizable in the law are available to any party which can form the basis for a judicial proceeding against the state treasurer in the matter under consideration.

G.

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60, is the landmark case in which the Supreme Court of the United States discussed and enunciated basic principles concerning the enforcement of duties by public officers. One of the basic principles enunciated by the court was whether judicial relief is available is to be determined, not by the officer or the person to whom the writ is directed, but by the nature of the thing to be done. In recent years, the court declared in Baker v. Carr, 7 L.Ed. 2d 663, 1.c. 702, as follows:

"There are, of course, some questions beyond judicial competence. Where the performance of a 'duty' is left to the discretion and good judgment of an executive officer, the judiciary will not compel the exercise of his discretion one way or another (Ky. v. Dennison, 16 L.Ed. 717, 729) for to do so would be to take over the office. Cf. F.C.C. v. Pottsville Broadcasting Co. 84 L.Ed. 656."

Upon a consideration of the foregoing discussion concerning the availability of judicial process, it is the opinion of this office that the nature of the thing to be done by the state treasurer in selecting depositaries for the approval of the governor and the auditor is not subject to judicial process in its exercise. The duties of the treasurer, governor and auditor in the designation of depositaries are within the scope of executive powers, and in the exercise of such powers the officers are free from any interference whatsoever by the judicial branch of the government pursuant to Article II, Section 1 of the Constitution. Therefore, if the contention is sound that the

constitution implies that the state treasurer shall submit further selections of depositaries upon disapproval by either the governor or the auditor of selections previously submitted, he is responsible for his failure to make further selections only to the people and may not be compelled or coerced in the matter by the courts.

IV.

This opinion has concluded that disapproval by the governor or the auditor of depositary selections by the treasurer prevents the designation of such selections as depositaries for state funds. It is further concluded that the state treasurer cannot be compelled or coerced by judicial process to submit further depositary selections for the approval of the governor and auditor. Therefore some comment is in order concerning the lawfulness of the three existing depositaries upon the expiration of depositary contracts on February 1, 1965. Although provisions therein continue the contracts in effect until other depositary selections are made, it is doubtful that these provisions alone are effective to continue existing lawful depositaries. However, it is unnecessary to determine the legal effect of these contractual provisions.

An applicable principle is stated in 42 Am. Jur. 726, as follows:

"A designation of a depositary is valid until the expiration of the term of office of the person designating, and until a new designation is made, but in the absence of statutory authority it will not bind his successor."

A similar statement appears at 26 A. C.J.S. 227 and there is nothing in the Missouri Constitution, statutes or case law contrary to this principle. In *Town of Canton v. Bank of Lewis County*, 92 S.W. 2d 595, l.c. 600, the question before the Supreme Court was whether a depositary bond continued beyond the expiration date of the depositary designation under circumstances in which a bank continued acting as a depositary for municipal funds. In holding the surety liable, the court indicated that the bank continued as a lawful depositary until a new designation was made. In *City Savings Bank v. Wayne County Treasurer, Mich.*, 47 N.W. 690, l.c. 691 and *Palo Alto County v. Ulrich, Iowa*, 201 N.W. 132, l.c. 134, 135, the courts held that depositaries remained lawful until new designations were made.

Therefore, it is the conclusion of this office that the existing depositaries continue to be lawful pending further designations.

V.

Under the conclusions of this opinion, a stalemate is indicated among the three constitutional state elective officers in regard to the designation of new depositaries for state funds. Apparently the authors of the constitution did not contemplate such a stalemate and no provision was made to resolve situations in which a stalemate might develop. In seeking a solution to the present impasse, this office has reviewed authorities from other jurisdictions. Whether by experience or foresight, some sister states have established procedures for the designation of depositaries which prevent an impasse from taking place.

In Virginia, depositaries for state funds are designated by a Treasury Board composed of the state treasurer, comptroller and state tax commissioner. Concurrence by a majority of the board is sufficient to make a lawful designation (Code of Virginia, Section 2 - 177). Substantially the same method for designating depositaries is followed in Louisiana, Wisconsin and Pennsylvania. In some states, designation of depositaries is the exclusive power of the state treasurer or the governor. In other states, the cabinet form of government is provided for and the principal state officers are appointed by the governor. In these states, depositary designations are made by members of the cabinet and thus the power and responsibility resides in the governor's office.

Therefore, the current impasse in regard to depositary designations can be avoided in the future upon lawful provision being made which would prevent an impasse from taking place. Some of the alternatives which are apparent from the methods employed by other states are as follows: absolute power to designate depositaries could be granted to a single officer, such as the governor or treasurer; the selection of depositaries could continue in the office of the treasurer with approval being required by a board composed of three or more officers and with an affirmative requirement for additional selections upon disapproval; or the complete power to designate depositaries could be conferred upon a board composed of three or more officers with clear authority in a majority of the board to act. Inasmuch as the power of designating depositaries is constitutional, a constitutional amendment would be required to accomplish any of the changes discussed above.

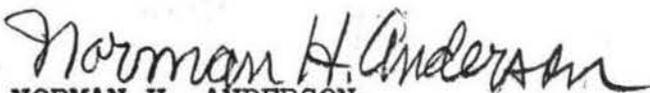
CONCLUSIONS

Pursuant to Article IV, Section 15, Constitution of Missouri, 1945, two distinct and separate powers are exercised in the designation of depositaries: selection by the state treasurer and approval by the governor and state auditor. Disapproval by either the governor or auditor of banking institutions selected by the treasurer as depositaries of state moneys on demand deposit prevents the designation of such banking institutions as state depositaries. The constitution contemplates approval by the governor and auditor when the treasurer selects banking institutions with sound capitalization, capable management and adequate facilities to service the complexities of the state's financial affairs. However, the governor may disapprove (or veto) the selection of a depositary without giving any reason therefor, such disapproval is not subject to judicial inquiry, and he is answerable for such action only to the people.

The primary responsibility for the designation of state depositaries is in the office of the state treasurer to be exercised through the power of selection. Upon disapproval by either the governor or the auditor of depositary selections, sound and cogent arguments indicate that the constitution contemplates the submission by the treasurer of further depositary selections for the approval of the governor and the auditor. However, in designating depositaries the governor, auditor and treasurer exercise constitutional, executive, discretionary powers. Pursuant to Article II, Section 1 of the Constitution (the separation of powers provision), these officers are free from interference by the judicial branch of the government in the exercise of such powers. Therefore, the state treasurer may not be compelled or coerced by judicial process to submit for approval additional and different selections of banking institutions as depositaries of state moneys on demand deposit upon the disapproval by either the governor or auditor of banking institutions previously selected.

Existing depositaries, lawfully designated by selection of a former state treasurer and approval by a former governor and the incumbent auditor, continue as valid depositaries by operation of law pending new designations.

Very truly yours,


NORMAN H. ANDERSON
Attorney General